

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH RAY WALKER,

Defendant and Appellant.

A092693

(Alameda County
Super. Ct. No. C129991)

I.

INTRODUCTION

Appellant Joseph Ray Walker appeals from a sentence imposed after we remanded for resentencing on a previous appeal. Appellant's first appeal and consolidated habeas corpus petition arose out of his conviction for failing to register as a sex offender in violation of Penal Code¹ section 290, subdivision (f), resulting in a 35-year-to-life sentence (*People v. Walker* (March 30, 2000, A081422/A087401) [nonpub. opn.] (*Walker I*). His convictions were affirmed, but the matter was remanded for resentencing. (*Walker I* at p. 38.) At resentencing on remand, the trial court sentenced appellant to state prison for 25 years to life. Appellant contends the matter must be remanded yet again for resentencing. We disagree and affirm.

¹ All statutory references are to the Penal Code.

II.

FACTS AND PROCEDURAL HISTORY

We will not revisit the facts of this case, as they were thoroughly set out in *Walker I*. After appellant was convicted by jury for failing to register as a sex offender, the court found he had been convicted of two prior serious felonies, which brought him within the three strikes sentencing scheme. (§§ 667, subd. (e)(1) & 1170.12, subd. (c)(1).) Appellant was sentenced to a 35-years-to-life imprisonment as a “third strike” offender. Appellant filed his original appeal, raising numerous claims of instructional and sentencing error. After filing the appeal, appellant then filed a petition for writ of habeas corpus claiming ineffective assistance of trial counsel. The appeal and habeas petition were ordered to be considered together.

In a nonpublished opinion filed on March 30, 2000, this court affirmed the judgment of conviction, but remanded to the superior court for resentencing with directions to strike the two five-year enhancements improperly imposed under section 667, subdivision (a)(1). Appellant’s petition for habeas corpus was denied. Appellant’s petition for rehearing was denied on April 25, 2000. Appellant’s petition for review was denied by our Supreme Court on July 19, 2000 (S088197).

The renewed sentencing proceedings took place on September 6, 2000. On remand, appellant asked the trial court to strike the prior conviction findings. Appellant claimed that due to his age (63), and the declining state of his health, a sentence of 25 years to life “was surely cruel and unusual punishment” and “tantamount to the death sentence.” The court refused to strike the prior convictions, stating, “in the context of this entire case and the history that this defendant has demonstrated over the years that is correctly and adequately summarized by the appellate court . . . I think it would be inappropriate for me to exercise the discretion and strike the prior convictions.” Appellant was sentenced to a term of 25 years to life pursuant to the three strikes law. This appeal followed.

III.

DISCUSSION

A. Settlement of Record Proceedings

Appellant's first claim of error is that he was denied due process in the proceedings to settle the record of an unreported conversation between him and the judge who conducted his resentencing hearing. By way of background, when the record on appeal was being prepared, appellate counsel moved for a settled statement detailing the contents of an unreported conversation between appellant and Judge Jeffrey W. Horner. This conversation occurred on September 5, 2000, the day before Judge Horner sentenced appellant to 25 years to life.

On September 5, 2000, appellant appeared in Department 13 of the Alameda County Superior Court for resentencing. However, the attorney who had represented him at trial, Mr. Ted Johnson, had not been contacted. The court made additional efforts that morning to contact Mr. Johnson, to no avail; thus, Mr. Johnson was not present in court.

Once it became evident that the sentencing hearing would not take place on September 5, Judge Horner entered the courtroom from his chambers but did not take the bench. He walked over to counsel table, where appellant was seated, and had a brief, unreported conversation with appellant. It is conceded that during this conversation, appellant expressed misgivings about having trial counsel represent him at resentencing. However, the participants to this conversation have conflicting recollections regarding Judge Horner's response.

After appellant's motion for a settled statement was denied by the superior court, this court ordered that a hearing be held for the purpose of settling the record concerning the unreported conversation of September 5, 2000. This court's order, issued on August 16, 2001, directed the Alameda County Superior Court "to conduct a hearing, before a judge other than Judge Jeffrey Horner, to settle the record [*sic*] for the unreported hearing held September 5, 2000."

The record correction hearing was held on December 7, 2001, before Alameda County Superior Court Judge Jon R. Rolefson. Appellant appeared represented by appellate counsel. The People submitted the matter on Judge Horner's declaration.

Judge Horner's declaration sets out his recollection of the circumstances surrounding the unreported conversation he had with appellant on September 5, 2000: "I first greeted Mr. Walker by saying, 'good morning, Mr. Walker.' Mr. Walker responded by saying, 'good morning, Judge, Your Honor.' I then explained to Mr. Walker that I had not yet been able to contact his trial attorney, Mr. Johnson, and that for this reason, we would not be able to proceed with the sentencing proceeding that morning. I informed Mr. Walker that I would continue the case for one day, until September 6th, at 9:00 a.m. and would continue in my efforts to contact Mr. Johnson and secure his attendance.

"Mr. Walker then stated to me, 'what if I have concerns about Mr. Johnson representing me?'

"I replied as follows: 'Then you need to discuss these concerns with Mr. Johnson tomorrow, when he appears in Court. And, as you know, you can also discuss those concerns with me tomorrow, in the courtroom. If you want me to, and if you ask me to, I will conduct a *Marsden* hearing,^[2] to determine whether Mr. Johnson should represent you, or whether I should appoint another attorney for that purpose. You remember, we held a *Marsden* hearing in this case after the jury returned its verdict.' " Judge Horner's declaration stated that appellant "responded by nodding his head, saying, 'yes, I remember.' " Judge Horner then told appellant, "So, I'm going to continue this matter for one day, until tomorrow, September 6th."

² The court's reference was to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). *Marsden* requires that the court provide the defendant an opportunity to express the specific reasons why he or she believes that counsel is providing inadequate representation. (*Id.* at pp. 124-125.) Appellant was familiar with the *Marsden* hearing procedure, as he participated in such a hearing during the trial of the underlying charges.

In the course of the hearing to settle the record, appellant testified about his recollection of the conversation he had with Judge Horner on September 5, 2000. Like Judge Horner, he recalled the conversation beginning with Judge Horner coming out and greeting him with a “good morning,” and appellant replying, “good morning, your honor.” However, once appellant was told that Mr. Johnson could not be contacted and that the sentencing would take place the next day, appellant testified he unequivocally “stated to the judge that I wanted another representative.” The judge replied that he would talk about that the next day when Mr. Johnson was there. Appellant was asked, “Did the judge say anything to you to the effect that it would be up to—up to you to bring that up the next day?” Appellant answered, “No, he didn’t.”

On September 6, 2000, appellant appeared with his original trial counsel, Mr. Johnson, for resentencing. We have reviewed the written transcript of the resentencing proceeding, and it contains no indication appellant had any complaint or was dissatisfied with counsel. At the hearing to settle the record, appellate counsel made an offer of proof “that Mr. Walker didn’t speak up on September 6th, because he was afraid of being held in contempt, and he was feeling a little confused because of his high blood pressure.”

On or about January 29, 2002, Judge Rolefson issued an order settling the record on appeal, which we quote at some length: “On the morning of September 5, 2000, defendant/appellant JOSEPH RAY WALKER appeared in Department 13 of this Court for resentencing by the Honorable Jeffrey W. Horner following remand for that purpose by the Court of Appeal. His court-appointed trial counsel, Theodore Johnson, had not been notified and therefore did not appear. [¶] Defendant/appellant was seated at counsel table when Judge Horner exited his chambers. Rather than take the bench, Judge Horner walked over near counsel table and informed defendant/appellant in an unreported colloquy that the Court had been unable to contact Mr. Johnson, and that the case would have to be continued to the next day. [¶] Defendant/appellant asked, ‘What if I have concerns about Mr. Johnson representing me?’ [¶] Judge Horner responded by telling defendant/appellant the following: He should discuss his concerns first with Mr. Johnson

when he appeared on September 6. Then, if he wanted different counsel appointed, he could request a ‘*Marsden*’ hearing [*People v. Marsden, supra*, 2 Cal.3d 118.] Judge Horner reminded defendant/appellant that a *Marsden* hearing had been conducted once before in the case, following return of the jury’s verdict, and that he would have to tell the Court on September 6 if he was requesting another one. [¶] Judge Horner then returned to his chambers, and the matter was continued to the next day.”

By requesting a hearing on settlement of the record, appellant tacitly acknowledged that the differing accounts of what occurred on September 5, 2000—specifically, how Judge Horner addressed appellant’s complaint about continued representation by trial counsel—could not be resolved without a hearing. By order of this court, a hearing was held on the matter, evidence was taken, and the record has been settled as to what was said during the unreported conversation. Dissatisfied that the court adopted Judge Horner’s recollection of events rather than his own, appellant now contends that the court’s “reliance on Judge Horner’s declaration was without a substantial basis, because the declaration was inherently incredible” Appellant additionally claims that the court’s “refusal to consider evidence which impeached the credibility of that declaration and supported appellant’s contrary showing was arbitrary.”

Our Supreme Court has repeatedly recognized that settlement of the record is primarily a question of fact to be resolved by the trial court. (See, e.g., *People v. Freeman* (1994) 8 Cal.4th 450, 510; *People v. Clark* (1993) 5 Cal.4th 950, 1011; *People v. Hardy* (1992) 2 Cal.4th 86, 183, fn. 30; *People v. Beardslee* (1991) 53 Cal.3d 68, 116.) Once settlement is ordered, the trial court has broad discretion to accept or reject a witness’s representations in accordance with its assessment of his or her credibility. (*People v. Freeman, supra*, 8 Cal.4th at p. 510; *People v. Beardslee, supra*, 53 Cal.3d at p. 116.) We easily find the settled statement’s resolution of the factual issues in this case is supported by substantial evidence in the form of Judge Horner’s declaration.

We find nothing to support appellant’s hyperbolic argument that Judge Horner’s declaration has no evidentiary value because it is “inherently incredible.” Appellant contends Judge Horner’s declaration should have been discounted because he

“purport[ed] to recall and recount, word for word, what had occurred in the unreported hearing held a year earlier,” which is contrary to human experience. Furthermore, appellant claims Judge Horner was obviously “biased” as evidenced by his failure to act immediately on appellant’s expressed dissatisfaction with his court-appointed attorney and his denial of appellant’s initial request for a settled statement. These arguments are far too weak to label Judge Horner’s declaration “inherently incredible.” At best, these arguments go to Judge Horner’s credibility, which was a matter for the judge who settled the record.

Appellant also complains that, in settling the record, Judge Rolefson “refused to consider evidence bearing on the credibility of Judge Horner’s declaration, which, if he had considered, could reasonably have led to the conclusion that the declaration was incredible.” Specifically, appellant claims Judge Rolefson erred by refusing to take judicial notice of an unpublished opinion of the Court of Appeal, authored by Judge Horner sitting by assignment, to show that “Judge Horner knew the proper use of quotation marks to quote exactly what a person or document said” The purported relevance of this evidence is explained as follows: “The opinion was strong evidence that Judge Horner knows the correct usage of quotation marks and that, when he enclosed what he and petitioner [*sic*] purportedly said at the unreported hearing of September 5, 2000, he intended to state exactly what was said. It is inherently incredible that anyone would be able to remember the exact words which he or another person said on a routine occasion approximately one year earlier.” (Original underscoring.)

Additionally, appellant claims the settlement court improperly curtailed his testimony when he attempted to explain why he wanted a new attorney and why he had not interrupted the September 6th hearing with a demand for a new attorney. Appellant also attempted to introduce various pieces of correspondence between himself and his appellate attorney showing that he intended to have appellate counsel represent him at resentencing. He also sought to introduce testimony by a family member recalling that when appellant and his family told Mr. Johnson in 1997 that they were dissatisfied with

him and did not want him to continue to represent appellant, Mr. Johnson broke down in tears and begged for another chance.

The settlement court precluded the admission of this evidence on the grounds of relevance, indicating it was never in dispute that appellant raised the question of his trial lawyer's continued representation with Judge Horner during their September 5, 2000 conversation and that the "issue here is what happened on the 5th, and that's the only thing I'm called upon to determine to settle" This ruling appears to be well founded, as the bulk of the proffered evidence involved matters "beyond the scope of the unreported court proceeding subject to settlement." (*People v. Montiel* (1993) 5 Cal.4th 877, 906-907, fn. 6.)

Even if the above-described evidence should have been admitted, we fail to see how it could have affected the result of the settlement hearing. As the settlement court recognized, the evidence had at most a peripheral bearing on the dispositive question, i.e., whether Judge Horner told appellant it was his responsibility to bring up the issue of discharging his attorney the following day at resentencing. Any evidentiary error was harmless.

B. Marsden Hearing

Walker next argues that the sentencing court erred in failing to give him a hearing, as required by *Marsden, supra*, 2 Cal.3d at pp. 124-125. Specifically, he claims he was denied his constitutional right to a fair trial and effective assistance of counsel by the judge's failure to address his dissatisfaction with his attorney, which was conveyed to the court during their conversation of September 5, 2000. Appellant argues that the judge improperly attempted to shift the burden to him to bring the matter up the next day in order to obtain a hearing. Furthermore, the judge did not give him any helpful suggestions on how to present his complaints and did not give him an opportunity to bring the matter up the next day.

Walker would have us conclude that the sentencing court's failure to address his trial counsel's alleged deficiencies, based on their brief unreported conversation of September 5, 2000, ends the matter and we should find a *Marsden* violation. Such a

narrow and compartmentalized approach is not what the Supreme Court contemplated when calling for a searching inquiry to be made by the trial court. (See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1101-1104; *People v. Smith* (1993) 6 Cal.4th 684, 696-697; *People v. Fierro* (1991) 1 Cal.4th 173, 204-207.)

The trial court's duty to conduct a *Marsden* hearing arises when a defendant asserts directly or by implication that his attorney's conduct has been so inadequate as to deprive him of his constitutional right to effective counsel. (*People v. Leonard* (2000) 78 Cal.App.4th 776, 787.) The court has no duty to conduct the hearing sua sponte. (*Ibid.*; see, e.g., *People v. Montiel, supra*, 5 Cal.4th at p. 906.) And while the trial court "must allow the defendant to express any specific complaints about the attorney and the attorney to respond accordingly," it retains discretion as to how and when the motion will be heard. (*People v. Smith, supra*, 6 Cal.4th at p. 694.) Here, the settled record indicates that Judge Horner instructed appellant to "discuss his concerns first with [trial counsel] when he appeared on September 6. Then if he wanted different counsel appointed, he could request a 'Marsden hearing.' " (Fn. omitted.) (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 65-66 [settled record, not any arguably contrary testimony at the settlement hearing, constitutes the binding appellate record].)

Because defense counsel was not present on September 5 to respond to any claimed deficiencies in his performance, it was not an abuse of discretion to continue the time and date for any potential *Marsden* hearing. Judge Horner's declaration for the settlement proceedings records his observations at the sentencing hearing held the next day: "Prior to my entering the courtroom to conduct the resentencing proceedings, I observed that [appellant] and Mr. Johnson, seated next to each other at counsel table, were engaged in a discussion with each other. I was not a party to this discussion, but remained in my chambers until I was informed that the discussion was complete and that [appellant] and Mr. Johnson were ready to proceed. My recollection is that this conversation between [appellant] and Mr. Johnson lasted for [*sic*] from 10 to 15 minutes."

The transcript of the September 6, 2000 resentencing hearing reflects that appellant did not complain about defense counsel or ask for new appointed counsel, nor did he object when defense counsel told the court that they were ready to proceed with sentencing. He did not mention the *Marsden* motion. In fact, appellant said nothing. Based on this record, we conclude that appellant abandoned his *Marsden* motion. Having abandoned that motion in the trial court, he cannot resurrect it in this appeal.

C. Right of Allocution

As a further ground for relief, appellant contends his sentence must be vacated and the matter remanded for a new sentencing hearing because he “was not given an opportunity to say anything” at his resentencing hearing, depriving him of his right of allocution.³

Initially, this case must be distinguished from cases where a criminal defendant signals his or her desire to have input into the sentencing proceeding but is prevented by the court from doing so. (See, e.g., *People v. Cross* (1963) 213 Cal.App.2d 678, 684 [counsel denied permission to make supplemental statement on defendant’s behalf].) In this case, appellant was not prevented from speaking at his resentencing hearing; rather, he was never given an express invitation to do so. As our Supreme Court has recently observed, “Although one decision of the Court of Appeal has held that a noncapital defendant is entitled to allocution as a matter of right (*In re Shannon B.* (1994) 22 Cal.App.4th 1235 . . . ; but see, contra, *People v. Sanchez* (1977) 72 Cal.App.3d 356, 359 . . . ; *People v. Wiley* (1976) 57 Cal.App.3d 149, 166 . . . ; *People v. Cross*[, supra] 213 Cal.App.2d [at p.] 682), no court has held that in a noncapital case a trial court must, on its own initiative, *offer* the defendant allocution.” (*People v. Lucero* (2000) 23 Cal.4th

³ The statutory embodiment of the right of allocution is contained in section 1200. That section provides that the sentencing court is to inquire of the defendant whether he has “any legal cause to show why judgment should not be pronounced against him.” Section 1201 limits this “legal cause” to three grounds: insanity, reasons for a new trial, and reasons for an arrest of judgment. Appellant makes no claim on appeal that he wished to speak to any of the three matters addressed in section 1201.

692, 717-718, original italics.) We decline appellant’s invitation to announce such a rule here.

Appellant contends that if he “had been given an opportunity to speak, he could have renewed his *Marsden* motion.” But there is nothing in the record before us to support this self-serving claim, and the appellate record cannot be augmented in this fashion. (See generally *People v. Tuilaepa* (1992) 4 Cal.4th 569, 585-586.)

In any event, contrary to the insinuation that appellant was thwarted from making his voice heard in these proceedings, we observe that appellant showed no hesitation in spontaneously interjecting a comment during defense counsel’s argument.⁴ We also point out that appellant triggered a *Marsden* inquiry in the earlier proceedings by handing his trial counsel a written motion outlining counsel’s claimed shortcomings. Thus, appellant was thoroughly familiar with the *Marsden* procedure and could have triggered such an inquiry here in a similar fashion without waiting for the court to expressly invite him to speak.

D. Ineffective Assistance of Counsel

Appellant contends his counsel rendered ineffective assistance because he failed to discover and present evidence of appellant’s medical condition at the sentencing hearing. First, we observe that post-conviction behavior, including post-sentence care and treatment in prison, is relevant in deciding whether to exercise section 1385 discretion to strike. (*People v. Warren* (1986) 179 Cal.App.3d 676, 689; *People v. Jackson* (1987) 189 Cal.App.3d 113, 119.) Secondly, we point out that defense counsel argued that appellant’s deteriorating medical condition should be taken into account in resentencing along with the fact that he had had “two strokes while incarcerated as well as a heart attack.” Counsel indicated, “In all probability [appellant’s] chances of surviving the 25 to life sentence is slim to none. Any additional time . . . is almost in the area of imposing

⁴ During argument at resentencing, when defense counsel indicated, “Mr. Walker is at least now 65,” appellant interrupted counsel to correct the record by saying, “63.”

a death sentence on [appellant].” Consequently, this is not a case in which trial counsel failed to pursue this line of argument entirely.

Nevertheless, appellant argues that if counsel had collected medical documentation, there would have been evidentiary support for this argument. As appellant contends on appeal, this “information was virtually meaningless without further information as to how severe and how debilitating the strokes and heart attacks were. Everyone knows that strokes can be very minor, even fully recoverable, and that people can survive heart attacks for decades. What would have made a difference would have been information—including, perhaps, a current evaluation by a non-prison doctor—as to the effect of the strokes and heart attack and what appellant’s prospects of surviving to serve an entire 25 years may have been.”

Appellant must affirmatively demonstrate prejudice in order to prevail on his ineffective assistance of counsel claim. It is not enough to show some speculative effect on the outcome of the proceeding. Appellant must demonstrate a reasonable possibility that the result would have been different if the errors had not occurred. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

Any deficiency in the information provided to the court regarding appellant’s medical condition cannot be found prejudicial. In explaining its reasons for its sentencing choices, the court stated: “With respect to Mr. Walker’s health condition, I am aware of the fact Mr. Walker has had some health setbacks while incarcerated in state prison, and I will accept what you have represented here, Mr. Johnson, as true. Without the necessity of any further proof, I’ll accept that representation as being accurate and complete. . . . [¶] I am sorry for the fact that Mr. Walker has suffered some deleterious health conditions in state prison, and I will consider that. And I have considered that in reviewing this case.” Nevertheless, the court ultimately elected not to strike appellant’s prior convictions. Therefore, the record reveals this argument was presented and rejected. No prejudice is shown.

E. Consideration of Dismissed Sex-Offense Charges

Appellant also contends the court was erroneously focused on 1996 molestation charges that had been dismissed when it refused to exercise its discretion and strike his prior convictions. As already noted, the court heard arguments of counsel and ultimately elected not to strike appellant's prior convictions, in part, because of appellant's " 'unrelenting criminality and current offense.' " Appellant argues that another remand is required because "[t]he only reason for believing that appellant's 1981 and 1983 sex offenses were not 'corrected' was that he was charged with similar offenses in 1996." In effect, appellant contends the court "base[d] a life sentence on charges which had not been proved beyond a reasonable doubt and which, in fact, had not been proved at all."

The full record does not support appellant's claim of unreliable decisionmaking based upon mere allegation. The trial court plainly stated several times during the resentencing proceeding that it was *not* relying on the dismissed charges. For example, the court stated: "The molestation cases were dismissed in view of the jury's verdict, and the sentence in the case that's now before this court, I am not considering . . . nor am I considering anything about the molestation case. That's a separate matter. The matter has been dismissed, so it's not before this court, and it does not contribute in any way in what this court's decision on resentencing will be." Error is not shown.

F. Cruel and Unusual Punishment

In *Walker I*, appellant forcefully argued that the 25-year-to-life sentence imposed under California's three strikes law violated the constitutional prohibition against cruel and unusual punishment. He resurrects this claim in the instant appeal and adds that "[t]he trial court could have avoided imposing an unconstitutional punishment in this case by striking the allegations of prior 'strikes.' "

A sentence violates the California constitutional ban on cruel and unusual punishment "[i]f the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], so that the punishment ' " 'shocks the conscience and offends fundamental notions of human dignity' " ' [citation]." (*People v. Lucero, supra*, 23 Cal.4th at pp. 739-740.) The California Constitution " " " " 'separately and

independently lays down the same prohibition’ ” ’ [citations]” as the federal constitution. (*Id.* at p. 739.)

In *Walker I*, we thoroughly considered appellant’s criminal history and his present offense, and found appellant’s punishment was not grossly disproportionate to his individual culpability and did not shock the conscience. Consequently, we found his sentence did not violate the constitutional prohibition against cruel and unusual punishment. (*Walker I* at pp. 35-38.) Appellant admits that the argument he makes in this appeal “is substantially the same as the argument made by appellant in Part XI of his Opening Brief in No. A081422, pages 95-102.” We see no need to add to the length of this opinion by rehashing arguments that have already been considered and rejected in *Walker I*.

Furthermore, at the time appellant’s reply brief in this case was being prepared, the constitutionality of California’s three strikes law was pending before the United States Supreme Court, and as appellant conceded, “[t]he decision in that case will probably be determinative of appellant’s contention”

After briefing in this matter was completed, the United States Supreme Court decided two cases challenging indeterminate sentences imposed under California’s three strikes law as cruel and unusual punishment. (*Lockyer v. Andrade* (2003) 538 U.S. ____ [123 S.Ct. 1166] and *Ewing v. California* (2003) 538 U.S. ____ [123 S.Ct. 1179].) Both cases involve the constitutionality of applying the three strikes law when the third strike is a non-violent, minor theft offense. The court found the sentences imposed were neither cruel nor unusual. On this basis, we once again reject appellant’s argument that the sentence imposed constitutes cruel and unusual punishment.

V.

DISPOSITION

The judgment is affirmed.

Ruvolo, J.

We concur: Haerle, Acting P.J.
Lambden, J.